APPENDIX A

UNITED STATES COURT OF APPEALS
FEDERAL CIRCUIT

No. 97-1002

HAGGAR APPAREL CO.,

Plaintiff-Appellee,

v.

THE UNITED STATES,

Defendant-Appellant.

July 27, 2000

Rehearing and Rehearing En Banc
Denied Oct. 19, 2000

Before NEWMAN, MICHEL, and CLEVENGER, Circuit Judges.

CLEVENGER, Circuit Judge.

Upon remand from the United States Supreme Court, *see United States v. Haggar Apparel Co.*, 526 U.S. 380, 119 S.Ct. 1392, 143 L.Ed.2d 480 (1999), defendant United States seeks reversal of the United States Court of International Trade's determination that plaintiff Haggar Apparel Co.'s imported articles qualified for the partial exemption from import duties specified in Subheading 9802.00.80 of the Harmonized Tariff Schedule of the United States, codified at 19 U.S.C. § 1202 (1994). *See Haggar Apparel Co. v. United States*, 938 F.Supp. 868, 874-75 (1996). Because the imported goods are disqualified from the partial exemption by application of 19 C.F.R. § 10.16(c), which we hold to be a reasonable

interpretation of the governing statute, we reverse the judgment of the Court of International Trade and remand with instructions to enter judgment in favor of the United States.

I

Haggar Apparel Co. ("Haggar") designs, manufactures, and markets apparel for men. This dispute arises from a refund proceeding for duties imposed by the United States Customs Service ("Customs") on men's pants shipped by Haggar to the United States from an assembly plant in Mexico. The fabric used to make the pants had been cut to shape in the United States and then shipped to Mexico, along with the thread, buttons, and zippers necessary to assemble the garments. The pants were assembled in Mexico, and later shipped back to the United States.

While in Mexico, however, the pants were "permapressed" at the Mexican plant. Permapressing, the parties agree, is a process designed to maintain a garment's crease and to avoid other creases or wrinkles from appearing through use. While there are various ways that permapressing may be accomplished, the pants in question were constructed of fabric that had been treated in the United States with a chemical resin. After assembly, the pants were baked in an oven at a facility in Mexico just prior to being shipped back to the United States; the baking activated the chemical resin and imparted the permapress qualities to the garments.

Upon import to the United States, Customs determined that the permapressing operation took the pants outside of the classification of Subheading 9802.00.80 of the Harmonized Tariff Schedule of the United States ("HTSUS"), which provides a partial exemption from otherwise-applicable duties. In relevant part, Subheading 9802.00.80, 19 U.S.C. § 1202, is limited to:

> Articles . . . assembled abroad in whole or in part of fabricated components, the product of the United States, which . . . (c) have not been advanced in value or improved in condition abroad except by being assembled and except by operations incidental to the assembly process such as cleaning, lubricating and painting.[1]

Customs has promulgated a regulation, 19 C.F.R. § 10.16(c) (1998), interpreting the "operations incidental to assembly process" statutory language used in the HTSUS:

> *(c) Operations not incidental to the assembly process.* Any significant process, operation, or treatment other than assembly whose primary purpose is the fabrication, completion, physical or chemical improvement of a component, or which is not related to the assembly process, whether or not it effects a substantial transformation of the article, shall not be regarded as incidental to the assembly and shall preclude the application of the exemption to such article. The following are examples of operations not considered incidental to the assembly as provided under subheading 9802.00.80, Harmonized Tariff Schedule of the United States (19 U.S.C. 1202):
>
> . . .
>
> (4) Chemical treatment of components or assembled articles to impart new characteristics, such as showerproofing, permapressing, sanforizing, dying or bleaching of textiles. . . .

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[1] The HTSUS became law on January 1, 1989, replacing the provisions of the former Tariff Schedule of the United States ("TSUS"). *See* 19 U.S.C. § 3004. Item 807.00 of the TSUS, the previous statute which governs some of the shipments at issue in this case, is identical to HTSUS 9802.00.80.

The regulation was adopted in 1975 by the Commissioner of Customs, after notice-and-comment rulemaking. *See* 39 Fed. Reg. 24651 (1974) (proposed regulation); 40 Fed. Reg. 43021 (1975) (final regulation).

Pursuant to section 10.16(c)(4), which specifically lists "permapressing" as an example of operations which fail to meet the requirements of HTSUS 9802.00.80, Customs denied the exception to duty. Haggar challenged the denial of its protest against such classification by filing this suit in the Court of International Trade. *See* 19 U.S.C. § 1515 (1994). (establishing protest and review procedures for Customs classification decisions).

The Court of International Trade concluded, pursuant to the multi-factor test established by this court's predecessor in *United States v. Mast Industries, Inc.*, 69 C.C.P.A. 47, 668 F.2d 501 (1981), that the permapressing operation was incidental to the assembly process and thus did not disqualify the pants from favorable treatment under HTSUS 9802.00.80. *See Haggar Apparel Co. v. United States*, 938 F.Supp. 868, 875 (CIT 1996). The court rejected Customs' contention that 19 C.F.R. § 10.16(c) controlled, finding that the regulation "conflicts with the plain language" of the HTSUS, and noting that the Federal Circuit had, in a series of prior cases, *see e.g.*, *General Motors Corp. v. United States*, 976 F.2d 716, 718 (Fed.Cir.1992), either ignored or discounted the regulation. The court also rejected Customs' argument that the regulation was entitled to deference pursuant to *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-44, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). *See Haggar Apparel*, 938 F.Supp. at 875.

Customs appealed to this court, which declined to consider the regulation under the *Chevron* framework, and affirmed the Court of International Trade. *See Haggar Apparel Co. v. United States*, 127 F.3d 1460, 1462 (Fed.Cir.1997). Customs then petitioned for a writ of certiorari to the Supreme Court,

which was granted. *See United States v. Haggar Apparel Co.*, 524 U.S. 981, 119 S.Ct. 30, 141 L.Ed.2d 790 (1998). The Supreme Court vacated this court's judgment, holding that HTSUS 9802.00.80 is ambiguous, for purposes of *Chevron* analysis, thereby requiring courts to defer to Customs regulations manifesting a reasonable interpretation of the statute. *See United States v. Haggar Apparel Co.*, 526 U.S. 380, 391-92, 119 S.Ct. 1392, 143 L.Ed.2d 480 (1999). The Court, however, declined to consider whether 19 C.F.R. § 10.16(c) was a reasonable interpretation of the "operations incidental to the assembly process" provision of HTSUS 9802.00.80, reasoning that such arguments were better presented to this court in the first instance. *See* 526 U.S. at 395, 119 S.Ct. 1392. Accordingly, the case was remanded for further proceedings. *See id.*

Upon remand, we ordered additional briefing and oral argument, *see Haggar Apparel Co. v. United States*, 1999 WL 798028 (Fed.Cir. Aug.20, 1999), and now hold that 19 C.F.R. § 10.16(c) is a reasonable interpretation of HTSUS 9802.00.80 (and TSUS 807.00), and that Customs properly applied the regulation in this case.

II

Regulations promulgated pursuant to rulemaking authority granted to administrative agencies are analyzed under the two-step procedure established in the Supreme Court's *Chevron* decision:

> First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. . . . [However,] [i]f the statute is silent or ambiguous with respect to the specific issue, the question for the court is

> whether the agency's answer is based on a permissible construction of the statute.

467 U.S. at 842-43, 104 S.Ct. 2778. In this case, the Supreme Court has already answered the first question: HTSUS 9802.00.80 is ambiguous for *Chevron* purposes. *See* 526 U.S. at 394, 119 S.Ct. 1392. Thus, our task is to "decide, not whether the . . . regulation represents the best interpretation of the statute, but whether it represents a reasonable one." *Atlantic Mut. Ins. Co., v. Commissioner*, 523 U.S. 382, 389, 118 S.Ct. 1413, 140 L.Ed.2d 542 (1998).

A

In conducting the second half of the *Chevron* analysis, we "need not conclude that the agency construction was the only one it permissibly could have adopted to uphold the construction, or even the reading the court would have reached if the question initially had arisen in a judicial proceeding." *Chevron*, 467 U.S. at 843 n. 11, 104 S.Ct. 2778 (*citing FEC v. Democratic Senatorial Campaign Committee*, 454 U.S. 27, 39, 102 S.Ct. 38, 70 L.Ed.2d 23 (1981); *Zenith Radio Corp. v. United States*, 437 U.S. 443, 450, 98 S.Ct. 2441, 57 L.Ed.2d 337 (1978); *Train v. Natural Resources Defense Council, Inc.*, 421 U.S. 60, 75, 95 S.Ct. 1470, 43 L.Ed.2d 731 (1975); *Udall v. Tallman*, 380 U.S. 1, 16, 85 S.Ct. 792, 13 L.Ed.2d 616 (1965); *Unemployment Compensation Comm'n v. Aragon*, 329 U.S. 143, 153, 67 S.Ct. 245, 91 L.Ed. 136 (1946); *McLaren v. Fleischer*, 256 U.S. 477, 480-81, 41 S.Ct. 577, 65 L.Ed. 1052 (1921)). Instead, our inquiry is confined to the question of whether the agency's interpretation of the statute is "inconsistent with [the] statutory mandate or . . . frustrate[s] the congressional policy underlying a statute." *Bureau of Alcohol, Tobacco & Firearms v. Federal Labor Relations Auth.*, 464 U.S. 89, 97, 104 S.Ct. 439, 78 L.Ed.2d 195 (1983). That is, we have refused to defer to an agency interpretation of a statute, as

expressed in duly-promulgated regulations, only when such an interpretation was "contrary to the intent of congress, as divined from the statute and its legislative history." *Muwwakkil v. Office of Personnel Management*, 18 F.3d 921, 925 (Fed.Cir.1994) (refusing to grant deference to regulations contrary to statutory intent); *see United States v. Shimer*, 367 U.S. 374, 383, 81 S.Ct. 1554, 6 L.Ed.2d 908 (1961) ("[W]e should not disturb [the agency interpretation] unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned."); *Oshkosh Truck Corp. v. United States*, 123 F.3d 1477, 1481 (Fed.Cir.1997) (refusing to grant deference where agency regulation was at odds with the statutory language).

B

Haggar presents two arguments as to why, in its view, 19 C.F.R. § 10.16(c) is not entitled to *Chevron* deference. First, it argues that the clear language of HTSUS 9802.00.80 excludes any interpretation of "operations incidental to the assembly process" that requires a comparison of the "effect" that a process has on the article. Second, Haggar suggests that Customs' regulatory position is merely one of convenience, conjured up for litigating purposes. We take these arguments in turn.

Haggar's statutory argument is that HTSUS 9802.00.80 requires what it calls a "comparative analysis of the operation itself to the assembly process." Appellee's Brief, at 26. The regulation, argues Haggar, replaces the proper analysis with one concerned with the relative effect of the operation on the article. *See id.* Customs responds by arguing that the regulation makes a choice in favor of a *qualitative* analysis of the effect of the operation on the article, as opposed to a *quantitative* analysis of the significance of the operation in relation to the assembly

process. Customs argues that the terms of the subheading support either a qualitative or quantitative line-drawing exercise, and that Customs, exercising legitimate agency policymaking discretion, has permissibly chosen the qualitative line. We agree.

There is little doubt that the statute permits the so-called "categorical" or "qualitative" analysis adopted by Customs. Indeed, far from excluding it, by listing exemplars, "cleaning, lubricating and painting," the statutory language appears to actually contemplate the imposition of a category-driven analysis. HTSUS 9802.00.80. The legislative history, by again listing categories and examples of the types of operations thought to be "incidental to the assembly process," fails to prohibit the approach adopted by Customs in section 10.16(c). H.R.Rep. No. 89-342, 89th Cong., 1st Sess. 49 (1965) (identifying "incidental" operations as "remov[ing] rust," "remov[ing] grease," and "add[ing] lubricants").

When Customs made the decision to adopt a categorical approach, it necessarily was required to make refined judgments about which kinds of operations fall on the side of "incidental to the assembly process," and which do not. For example, even with the statutory painting exemplar, Customs has decided that some kinds of painting are "incidental," and others are not, the distinction in the regulation being whether the paint operation is primarily for preservative or for decorative purposes. *Compare*, *e.g.*, 19 C.F.R. § 10.16(b)(3) (listing "[a]pplication of preservative paint or coating, including preservative metallic coating . . ." as incidental to the assembly process) *with* 19 C.F.R. § 10.16(c)(3) (listing "[p]ainting primarily intended to enhance the appearance of an article or impart distinctive features or characteristics" as *not* incidental to the assembly process). So, too, does the regulation distinguish varieties of pressing: some forms of pressing have been adjudged by Customs to be incidental to the assembly process, and others—such as permapressing—

have been categorized by Customs to fall outside activity incidental to the assembly process. *Compare* 19 C.F.R. § 10.16(b)(7) (listing "[f]inal calibration, testing, marking, sorting, pressing, and folding of assembled articles" as incidental) *with* 19 C.F.R. § 10.16(c)(4) (listing "[c]hemical treatment . . . such as . . . permapressing" as *not* incidental).

We think that the kind of line-drawing Customs has exercised in its regulation is inevitable, and even necessary, once Customs embarks on a categorical approach to resolution of the statutory ambiguity. At the margins of any judgment call, reasonable minds may differ as to the judgment reached. Such is the natural consequence of regulatory line-drawing, much as the natural consequence of judicial line-drawing will permit of marginal dispute. But that is not to say that the line-drawing exercise lacks reason or is arbitrary. When *Chevron* applies to a fact situation, the regulator supplants the judge to decide in the first instance whether a fact circumstance falls within or without the law. The subsequent judicial inquiry under *Chevron* in this case is whether the agency has selected a "reasonable interpretation of the statutory phrase 'operations incidental to the assembly process.' " *Haggar Apparel*, 526 U.S. at 394, 119 S.Ct. 1392.

It may well be, as Haggar and the *amicus* argue, that a more generally quantitative approach—directly comparing the operation with the overall assembly process—is a better way to address the question posed by HTSUS 9802.00.80. In essence, Haggar argues that a test derived from the combination of quantitative and qualitative factors outlined in *United States v. Mast Industries*, 69 C.C.P.A. 47, 668 F.2d 501, 505 (1981), is "more faithful" to Congressional intent. But any analysis of what approach is "better" under the circumstances or (arguably) "more faithful" to Congressional intent would require this court to intrude upon the agency's mandate to reconcile conflicting policy goals in matters in which it has been delegated authority to implement the intent

of Congress. *See Haggar Apparel*, 526 U.S. at 387, 119 S.Ct. 1392 (noting statutory delegation to the Secretary of the Treasury and to the Commissioner of Customs, respectively); *see also Chevron*, 467 U.S. at 844-45, 104 S.Ct. 2778 (citing *National Broadcasting Co. v. United States*, 319 U.S. 190, 63 S.Ct. 997, 87 L.Ed. 1344 (1943)); *National Labor Relations Board v. Seven-Up Bottling Co.*, 344 U.S. 344, 73 S.Ct. 287, 97 L.Ed. 377 (1953); *Securities & Exchange Comm'n v. Chenery Corp.*, 332 U.S. 194, 67 S.Ct. 1575, 91 L.Ed. 1995 (1947); *Republic Aviation Corp. v. National Labor Relations Bd.*, 324 U.S. 793, 65 S.Ct. 982, 89 L.Ed. 1372 (1945); *National Labor Relations Bd. v. Hearst Publications, Inc.*, 322 U.S. 111, 64 S.Ct. 851, 88 L.Ed. 1170 (1944). While this court may have chosen a different approach were we not required to defer to reasonable agency interpretations, *see Mast Indus.*, 668 F.2d at 505, or if the question had arisen in a solely judicial proceeding, *see Chevron*, 467 U.S. at 843 n. 11, 104 S.Ct. 2778, we cannot, consistent with well-settled principles of deference to agency interpretations of statutes they administer, hold that the regulations are contrary to congressional intent, as embodied in HTSUS 9802.00.80 and its legislative history. *Cf. Oshkosh Truck*, 123 F.3d at 1481; *Muwwakkil*, 18 F.3d at 925. Therefore, *Mast Industries*, an otherwise quite reasonable analytic tool, must yield to the language of Customs' regulation when imported articles reasonably fall within one of the regulatory categories expressed in 19 C.F.R. § 10.16(c).

Haggar also argues that Customs is adopting the position set forth in 19 C.F.R. § 10.16(c) solely for the purposes of litigation, thereby disqualifying the interpretation for deference under a *Chevron* analysis. *See, e.g., Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212, 109 S.Ct. 468, 102 L.Ed.2d 493 (1988) (declining to defer to "agency litigating positions that are wholly unsupported by regulations, rulings, or administrative practice"). We reject

this contention. Prior to the Supreme Court's decision in *Haggar Apparel*, the law of this circuit was that "neither this court nor the Court of International Trade defers to Customs' interpretation of a tariff heading on the basis of special deference pursuant to [*Chevron*]." *Universal Elecs. Inc. v. United States*, 112 F.3d 488, 491-93 (Fed.Cir.1997); *see also Rollerblade, Inc. v. United States*, 112 F.3d 481, 484 (Fed.Cir.1997) (holding that no *Chevron* deference applies to classification decisions). Under these conditions, and given that *Mast Industries* was the leading precedent on the question presented here, it is unsurprising that Customs would tailor its legal arguments to this court and to the Court of International Trade accordingly. This, however, does not mean that Customs' classification in this case, based upon the precise language in 19 C.F.R. § 10.16(c), is "wholly unsupported" by official agency actors. *Bowen*, 488 U.S. at 212, 109 S.Ct. 468 ("[W]e have declined to give deference to an agency counsel's interpretation of a statute where the agency itself has articulated no position on the question."). Indeed, it would seem perverse for this court—after being overruled by the Supreme Court—to adopt the position that agency arguments seeking to implement the Court's guidance are insupportable because of this court's earlier adherence to an incorrect legal principle. Customs' interpretation of HTSUS 9802.00.80, as expressed in 19 C.F.R. § 10.16(c), is reasonable and is accordingly entitled to judicial deference.

III

Our final question is whether Customs was correct in classifying the permapressing conducted on the pants in Mexico as an "operation not incidental to the assembly process." 19 C.F.R. § 10.16(c). The parties do not dispute the material facts concerning the imported articles. As noted above, the fabric was chemically treated in the United States, and then oven-baked after assembly in Mexico to impart the

"permapressed" qualities. Accordingly, this analysis resolves to a question of whether Customs has properly applied its regulation to the articles at issue.

We have little trouble concluding that Customs properly applied its regulation in this case. Section 10.16(c)(4) specifically lists "permapressing" as a category of operations that are not "incidental to the assembly process." Further, it is conceded by Haggar that the oven-baking—which causes the chemical change in the fabric, imparting the "permapress" qualities—occurred only in Mexico. The pants left the United States without permapressed qualities; they returned permapressed. Customs did not err in applying section 10.16(c) to the goods in question.

CONCLUSION

Customs' interpretation of HTSUS 9802.00.80, 19 U.S.C. § 1202, as found in 19 C.F.R. § 10.16(c), is reasonable and thus entitled to judicial deference. Further, Customs' application of section 10.16(c) to the permapressing operation conducted on Haggar's imported articles in this case is not incorrect. We therefore conclude that Customs' determination that the pants at issue do not qualify for the partial exception from duty allowed by HTSUS 9802.00.80 (and, in prior years, TSUS 807.00) must be sustained. The Court of International Trade's judgment to the contrary is accordingly reversed, and the case is remanded with instructions to enter judgment in favor of the United States.

COSTS

No costs.

REVERSED AND REMANDED.

APPENDIX B

UNITED STATES COURT OF INTERNATIONAL TRADE

No. 93-06-00343

Slip Op. 96-110

HAGGAR APPAREL COMPANY,

Plaintiff,

v.

UNITED STATES,

Defendant.

July 12, 1996

OPINION AND JUDGMENT ORDER

DiCARLO, Chief Judge:

Plaintiff, Haggar Apparel Company challenges the denial of protests filed pursuant to section 515 of the Tariff Act of 1930, 19 U.S.C. § 1515 (1988). Haggar contends the United States Customs Service erroneously denied a duty allowance for fabric components manufactured in the United States and shipped to Mexico for assembly into men's pants. Jurisdiction is proper under 28 U.S.C. § 1581(a) (1988). The court finds the merchandise in question is entitled to a duty allowance.

BACKGROUND

The imported merchandise consists of men's pants assembled in Mexico from components manufactured in the United States. (Stip. Facts ¶¶ 9, 43.) Haggar markets these pants under the "Presstige" name. The most important performance characteristics of Presstige pants are crease retention and seam and surface flatness; the pants are "wash and wear" garments. (Tr. at 11-12, 40; Stip. Facts ¶¶ 18-19.)

Haggar achieves its performance requirements by using a "pre-cured," "post-cured," or pure synthetic fabric. (Stip. Facts ¶ 18.) Curing involves the application of heat to fabric treated with resin. Under the pre-cured method, resin and heat are both applied at the textile mill; Haggar purchases the fabric, cuts it to shape, assembles the components, and presses the completed garment. (Stip. Facts ¶ 20; Tr. at 12.) Under the post-cured approach, Haggar purchases resin-treated fabric from the mill, cuts, assembles, and presses the garment, and bakes it in a curing oven. *Id.* Both the pre-cured and post-cured methods use fabric of a cotton-synthetic blend, which is typically sixty percent cotton and forty percent polyester. (Stip. Facts ¶ 9; Tr. at 12.) Presstige pants made from a pure synthetic fabric require pressing, but do not require resin treatment or baking. (Tr. at 43.)

All methods for producing Presstige pants involve the same assembly and pressing process. *Id.* at 13. The only difference occurs after pressing. *Id.* In the post-cured method, the pants are loaded on an oven conveyer, baked, and unloaded from the conveyer. Improper pressing of the garment prior to the baking process will result in the product being sold as a "second," as proper pressing is essential to crease retention and surface flatness. (Stip. Facts ¶ 41.) In addition, a crease defect cannot be reversed after oven-baking. *Id.*

The garments at issue are Model 245 Presstige pants imported by Haggar in 1988 and 1989. (Stip. Facts ¶ 36;

Haggar's Customs Protest at 3-4.) These pants were made from fabric style 2010, which is a post-cured fabric comprised of sixty percent combed cotton and forty percent fortrel polyester. (Stip. Facts ¶ 39.) The fabric and other components, such as buttons, thread, zippers, and trim items, were manufactured in the United States. *Id.* ¶¶ 47-50. Haggar cut the resin-treated fabric to shape, and exported the fabric and remaining components to Mexico, where they were assembled into pants by Haggar's wholly owned subsidiary, Haggarmex. *Id.* ¶¶ 9, 43-52. Following assembly, pressing, and baking, Haggar attached hangtags and tickets to the pants and packaged and shipped them to the United States. (*Id.* ¶ 52; Tr. at 153-154.)

Upon importation, Haggar sought a duty allowance for pre-1989 entries under item 807.00 of the Tariff Schedule of the United States [hereinafter "TSUS"], and for the remaining entries under subheading 9802.00.80 of the Harmonized Tariff Schedule of the United States [hereinafter "HTSUS"]. Item 807.00, Subpart B, Part I, Schedule 8, TSUS (1987); Subheading 9802.00.80, Chapter 98, Section XXII, HTSUS (1987) (implemented into law on Jan. 1, 1989, pursuant to 19 U.S.C. § 3004 (1988)). Customs denied a duty allowance for the post-cured, cut-to-shape fabric components, but granted the duty allowance for all other components produced in the United States. For the post-cured fabric Customs assessed duties at the rate of 16.5 percent *ad valorem* under TSUS item 381.62.40, and 17.7 percent *ad valorem* under HTSUS subheading 6203.42.40. (Stip. Facts ¶ 11.)

DISCUSSION

Customs is entitled to a presumption of correctness as to its factual determinations. *See* 28 U.S.C. § 2639(a)(1) (1988) (presumption); *see also Goodman Mfg., L.P. v. United States*, 69 F.3d 505, 508 (Fed.Cir.1995) (limiting presumption to factual determinations). Plaintiff bears the burden of

proving that Customs' determination is incorrect. 28 U.S.C. § 2639(a)(1).

Item 807.00(c) of the TSUS affords domestic goods exported for purposes of assembly a partial duty allowance upon re-entry into the United States. To qualify under item 807.00(c), fabricated components of the United States assembled abroad must not be advanced in value abroad outside of assembly and operations incidental to the assembly process. Item 807.00(c), TSUS. Item 807.00 provides:

> 807.00 Articles assembled abroad in whole or in part of fabricated components, the product of the United States, which (a) were exported in condition ready for assembly without further fabrication, (b) have not lost their physical identity in such articles by change in form, shape, or otherwise, and (c) have not been advanced in value or improved in condition abroad except by being assembled and except by operations incidental to the assembly process such as cleaning, lubricating, and painting.

Item 807.00, TSUS. Pursuant to item 807.00, Customs assesses a duty upon eligible merchandise based "upon the full value of the imported article, less the cost or value of such products of the United States." *Id.* The HTSUS provides an identical exemption under Subheading 9802.00.80.

The parties do not challenge that the imported merchandise was advanced in value or improved in condition abroad. Further, they agree that the articles were exported in condition ready for assembly without further fabrication and that the articles have not lost their physical identity. (Stip. Facts ¶¶ 44-45.) Therefore in determining whether the components qualify for an item 807.00 trade allowance, the dispositive issue is whether ovenbaking is an operation incidental to assembly. To answer this question, the court

turns to the Federal Circuit's decision in *United States v. Mast Industries, Inc.*, 668 F.2d 501 (C.C.P.A.1981).

I. The Mast Factors

To determine whether button-holing and pocket-slitting operations were incidental to assembly of women's pants, the court in *United States v. Mast* examined the following factors:

> (1) Whether the cost of the operation relative to the cost of the affected component and the time required by the operation relative to the time required for assembly of the whole article were such that the operation may be considered "minor."
>
> (2) Whether the operations in question were necessary to the assembly process. . . .
>
> (3) Whether the operations were so related to assembly that they were logically performed during assembly.

Mast, 668 F.2d at 506. The *Mast* court also indicated a fourth consideration: "whether economic or other practical considerations dictate that the operations be performed concurrently with assembly." *Id.* at n. 7. These factors are not exhaustive, and all factors may not be relevant in each case. *General Motors Corp. v. United States*, 976 F.2d 716, 719-20 (Fed.Cir.1992). Nonetheless, the most basic question—whether such operations are of a minor nature incidental to the assembly process—remains the focus of the court's inquiry.

(A) Cost Comparisons

The first prong of the *Mast* comparisons examines whether the challenged operation constitutes a significant proportion of the total assembly process. To make this determination, the court must first define the scope of the challenged operation, because in making the cost determination, the court must weigh the expense and time costs of the challenged operation against the cost of assembly. According to plaintiff, the

court should compare only ovenbaking against total assembly costs. (Haggar's Post Trial Br. at 1-2.)

Defendant argues the court must compare all non-assembly costs against only pure assembly expenses. (Def.'s Post Trial Br. at 2-3.) To accomplish this task, defendant first contends that operations included on the assembly side of the *Mast* comparisons are solely those operations which encompass the joinder of two solids. *Id.* at 16 & n. 10. Defendant argues that, at a minimum, the court must exclude *all* non-joinder operations, including minor chopping and trimming operations, from the assembly side of the *Mast* comparisons. *Id.* at 16-17.

Second, defendant contends the court must combine *all* non-joinder operations which were excluded from the assembly side of the *Mast* comparisons for comparison against pure assembly costs in order to ascertain whether the challenged operations were more than minor improvements, and therefore, not incidental to assembly. *Id.* According to defendant, failing to combine all non-joinder costs for comparison against pure assembly costs would result in a piecemeal analysis that would undermine "item 807.00 by allowing major and significant operations to be broken down to [a] point where each step could be called minor." *Id.* at 17 (quoting *General Motors*, 976 F.2d at 720). Defendant contends this court in *Surgikos, Inc. v. United States*, 12 Ct. Int'l Trade 242, 245, 1988 WL 24664 (1988) similarly combined all non-assembly operations for comparison against pure assembly operations in determining whether the challenged operations were minor and, therefore, incidental to assembly. *Id.* at 17-18.

The court disagrees with defendant's readings of *General Motors* and *Surgikos*. Neither decision demands that *all* non-joinder operations must be combined for comparison against only pure assembly functions. The Federal Circuit in *General Motors* disagreed with the lower court's "piecemeal

analysis" because the lower court improperly sought to separate the various components of a single process—coating operations during automobile assembly—that should have been considered together. 976 F.2d at 720. The Federal Circuit determined that isolating the various components of the coating operation for an item 807.00 allowance would have allowed importers to argue that each component of the challenged operation was minor, even though the operation as a whole was a significant process, and therefore not incidental to assembly. *Id. General Motors*, however, did not mandate combining *all* "non-joinder" functions with the coating operations when comparing expense and time costs against the cost of the affected components, and the duration of assembly, as defendant now urges. If this were the case, the Federal Circuit would have also grouped the other non-joinder processes including water testing, detail work, inspections, wheel alignment, and final drive tests with the coating operations in its *Mast* calculations. *See id.* at 717-18 (listing non-assembly operations).

Surgikos also fails to support defendant's position. *Surgikos* concerned the assembly of surgical sheets assembled in Mexico. Although the court in *Surgikos* did weigh the only two nonassembly operations—fenestration (creating a rectangular opening in the sheet) and finish folding (functional folding to maintain antiseptic conditions)—against the pure joinder operations, Customs had challenged *both* fenestration and finish folding as nonincidental to assembly; the joinder of the surgical sheets was the only remaining operation. 12 Ct. Int'l Trade at 243-44. Customs, by challenging *all* nonassembly operations as not being incidental to assembly, necessarily mandated that the court compare all nonassembly operations against pure assembly. The issue of whether all nonassembly operations must be weighed against pure assembly, however, was not before the court. The court therefore does not read *Surgikos* as broadly as defendant urges.

The court finds that the minor chopping, handling and trimming operations are not merely incidental to assembly, but are so integral to the process as to merge with it. (*See* Court's Findings, Tr. at 511) (noting that such processes are related to assembly and may also be part of assembly); *see also General Instrument Corp. v. United States*, 499 F.2d 1318, 1319-21 (C.C.P.A.1974) (finding spooling, shaping & machine pressing, cement coating, cutting, stripping, and weaving of magnet and lead wire exported from the United States to Taiwan where wire was wound into coils and cable harnesses as constituting assembly for purposes of item 807.00). These minor operations include placing a notch into the zipper to facilitate the next assembly step, minor trimming of loose threads, simultaneous sewing and cutting of the fly lining, the cutting apart of bands (fabric belt encircling waist) & separation of excessive band lining, the sorting and placing of belt loop components together on a crimping machine to bond the components together, as well as certain supply and handling operations and various manipulations of the fabric so as to make further assembly more efficient. (Tr. at 128-40.) The court, therefore, rejects defendant's interpretation of assembly as purely the joinder of two components as overly restrictive.

The question remains whether pressing is part of the challenged operation compared against assembly. Haggar contends that the challenged operation consists solely of ovenbaking. (Haggar's Post Trial Br. at 1-2; Haggar's Post Trial Reply Br. at 9.) According to Haggar, pressing could not be part of the challenged operation because Customs has considered pressing by itself to be minor and incidental to assembly under item 807.00. *Id.* at 11. However, pressing is necessary to further the curing process. (*See* Stip. Facts ¶ 42) ("the post-curing process used on the [pants in issue] was achieved by pressing and ovenbaking.") Although in a strict sense, pressing is not part of curing, as the actual heat-induced transformation of the fabric is performed during

oven-baking, pressing is integrally related to Haggar's purpose in conducting the curing process, namely to develop crease retention and greater surface and seam flatness in its garments. (Stip. Facts ¶ 19; Tr. at 44.)

This decision is consistent with the decision of the Federal Circuit in *General Motors*. In *General Motors*, the Federal Circuit rejected the lower court's delineation of the challenged painting operation as too narrow, finding "that all coating operations performed upon the disputed components . . . must be considered in conjunction with topcoat painting operations to determine if coating operations, collectively, are minor incidents to assembly." 976 F.2d at 720.

The pressing operation, like the coating operations in *General Motors*, did not interfere with item 807.00's prescriptions when performed in isolation. However, when performed prior to ovenbaking, pressing does more than simply impart a temporary smoothness to the fabric. It begins the curing process which, once started, imparts permanent new characteristics to the pants. Thus, the entire curing operation in this case is analogous to the entire finish painting operation in *General Motors*; the court must consider ovenbaking in conjunction with pressing when applying the *Mast* test.

Application of the first *Mast* factor involves comparing (1) the cost of the curing operation relative to the cost of the post-cured fabric component, including, pursuant to *General Motors*, the comparison of Haggar's investment in the curing operation versus its investment in the assembly process; and (2) the time required for curing, relative to the time required for assembly. *General Motors*, 976 F.2d at 719-21.

(i) Cost Comparisons of Curing Relative to the Cost of the Affected Components, and to the Cost of the Assembly Process

Dividing the cost of pressing and baking ($0.0529) by the cost of the fabric components ($3.08) indicates the curing operation constitutes 1.72 percent of the component cost.[1] (Joint Stip. at 2-3.) Further, comparing the cost of curing (again pressing and ovenbaking, $0.0529) against the total operation cost ($0.500) constitutes 10.6 percent. *Id.* The court does not find either figure significant. *See Mast*, 668 F.2d at 506 (finding 15% minor [$0.003 of $0.020 in percentage terms]).

(ii) Capital Investment Comparisons

The court in *General Motors* also found a capital investment determination relevant to the cost analysis. 976 F.2d at 721. Defendant argues that proper analysis under this factor requires the use of replacement costs, as supplied by the parties in their cost stipulations. (Def.'s Post Trial Br. at 21, 39.) According to defendant, if the court instead were to use depreciated costs, the qualification for a duty allowance would vary by the year the merchandise in question would be imported, or by the age of the equipment used on the imported merchandise. *Id.* at 21. Thus similarly-positioned importers might receive disparate treatment for the same operation.

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[1] The parties stipulated that overhead costs of "factory supplies, pressing expense, H & O repair, H & O repair parts, porters, office security guard, boiler maintenance, cook, legal, doctor, severance pay, unemployment, insurance (unemployment and insurance are two separate parts), dues and subscription, telephone, employee benefits, other professional fees, office supplies, janitor supplies, travel, auto expense[s], advertising and building maintenance cannot be allocated to the pants at issue," or to a division of assembly versus nonassembly costs. (Parties' Stip., Tr. at 535.) The court therefore makes *Mast* cost comparisons exclusive of overhead.

Plaintiff argues depreciation costs are proper. (Haggar's Post Trial Reply Br. at 19, 20.) Plaintiff argues Customs' practice has been to permit depreciation of the machinery, as in accordance with generally accepted accounting procedures. (Haggar's Post Trial Br. at 10.) According to plaintiff, the investment cost of the ovens was zero, as the ovens were 25 years old and fully depreciated when they were transferred to Mexico. *Id.* Permitting depreciation, the only remaining equipment for comparison would be the pressing equipment ($430,000), which would constitute 50 percent of assembly capital costs ($857,724). (Joint Stip. at 4) (total capital costs minus pressing & ovenbaking). If the court did not permit the depreciation of the oven to zero, the capital investment of the curing equipment would be $522,808, or 61 percent of the assembly capital costs. *Id.* The court cannot consider either of these figures as minor and finds that these factors weigh against granting a duty allowance under item 807.00.

(iii) Time Comparisons

The Federal Circuit in *General Motors* found "where operations . . . involve significantly automated or non-labor processes (*such as baking*), this factor provides little guidance on whether operations are of a 'minor nature.' " 976 F.2d at 720 (emphasis added). Ovenbaking is an automatic process which accounts for nearly one-third of the total operation time. (Revised Joint Stip. at 1) (dividing 15 minutes ovenbaking time by 42 minutes for total operation). The court, pursuant to *General Motors*, does not address this test here.

(B) Necessity and Logical Relatedness to Assembly

Mast factors 2 and 3 examine respectively whether the challenged operations were so related to assembly that they were necessary to the assembly process, and whether the challenged operations were so related to assembly as to be performed during assembly. *Mast*, 668 F.2d at 506.

The parties have stipulated that "[t]he effect of ovenbaking is to create crease retention and greater surface and seam flatness in the garment, and prevent wrinkling." (Stip. Facts ¶ 55.) These features are unrelated to assembly. The parties in fact have agreed that assembly occurs without the initiation of the curing process—pressing—so it follows the entire curing operation would be similarly unnecessary. (Stip. Facts ¶ 38.) The court finds that ovenbaking and pressing are not necessary, nor related to assembly. (Court's Findings, Tr. at 455, 503, 505-506.)

(C) Economic & Other Practical Considerations

The fourth *Mast* factor examines whether economic and practical considerations dictate that the challenged operations be performed concurrently with assembly. 668 F.2d at 506 n. 7.

Defendant argues that plaintiff cannot present any considerations requiring that curing be conducted concurrently with assembly, because curing does not begin until after assembly is completed. (Def.'s Post Trial Br. at 41-42.) According to defendant, *Mast* and its progeny demonstrate that "concurrently" with assembly only extends to actual joinder. *Id.* at 16 n. 10, 41-42.

The court does not agree with defendant's narrow interpretation of "concurrently." This restrictive interpretation would, in effect, require a showing that ovenbaking must be done during assembly because it is necessary to further assembly. However, this inquiry is already accomplished by the necessity requirement in *Mast*. The legislative history of item 807.00 demonstrates clear Congressional intent to permit duty-free treatment of a component manufactured in the United States if subjected to an operation of a minor nature incidental to the assembly process, whether done before, during or after assembly."

Tariff Schedules Technical Amendments Act of 1965, H.R.Rep. No. 342, 89th Cong., 1st Sess. 49 (1965).

The parties agree that, if the pants were packed and shipped to the United States immediately after assembly, but before curing, Haggar would incur additional costs for repacking and reshipping to the distribution centers. (Parties' Stip., Tr. at 545.) Moreover, an additional work shift would have to be added to complete the ovenbaking and pressing at higher labor costs. *Id.* at 547. Mr. Ernie Ramirez, International Accounting Manager for Haggar, also testified that "throughput" time (total time from when the garment is cut to when it is received by the customer) would be increased by 3-4 days, and separating ovenbaking from assembly would result in higher transportation costs, increased production times, the need for additional facility investment, higher handling costs, and additional overhead expenses. (Tr. at 347, 399-402.) Finally, Mr. Frank Bracken, President of Haggar Apparel Co., testified that post-curing immediately after assembly was necessary because there was a risk with post-cured fabric that permanent creases and wrinkles would occur during shipping, and render the product "useless." (Tr. at 39, 49-50.) Although the curing operation does not preclude assembly from occurring, the court finds the curing of the fabric would logically occur at this time to minimize damages and economic costs. The court holds that economics and practicality dictate that Haggar cure its merchandise concurrent with assembly.

The court finds the costs of the curing operation are insignificant as a percentage of the fabricated components and of the entire operation. Moreover, strong economic and practical considerations dictate that curing be performed concurrently with assembly. After balancing the relevant factors, the court finds that the curing operation is "incidental to the assembly process" within the meaning of item 807.00, TSUS, and subheading 9802.00.80, HTSUS.

II. Advancement in Value

Defendant argues that, even if the *Mast* analysis results in a finding that the operation is minor, additional inquiry is necessary to determine whether the imported article has undergone a prohibitory advancement in value. (Def.'s Post Trial Br. at 23-26.) Therefore, according to defendant, the court should consider the importance to Haggar of the crease retention and the greater surface and seam flatness as an additional factor. *Id.*

Defendant's arguments are meritless. Item 807.00 provides that a duty allowance is permissible so long as the merchandise in dispute has not been advanced in value "except by operations incidental to the assembly process." Item 807.00(c), TSUS. Item 807.00 does not prohibit an advancement in value, therefore, so long as the operation in question is incidental to assembly.

III. 19 C.F.R. Section 10.16

Defendant contends 19 C.F.R. § 10.16 (1988) governs the application of item 807.00. Subsection 10.16(c) provides:

> Any significant process, operation, or treatment other than assembly whose primary purpose is the fabrication, completion, physical or chemical improvement of a component, or which is not related to the assembly process, whether or not it effects a substantial transformation of the article, shall not be regarded as incidental to the assembly and shall preclude the application of the exemption to such article.

19 C.F.R. § 10.16(c) (1988) (1989 version identical).

The court disagrees. Subsection 10.16(c) conflicts with the plain language of item 807.00. Item 807.00 does not prohibit operations which merely *impart new characteristics* to the article being assembled as the regulation provides, but in fact permits a duty allowance for such improvements to the

articles so long as the operation imparting those characteristics was incidental to assembly. Moreover, the Federal Circuit has strongly qualified 19 C.F.R. § 10.16, *see Chrysler Corp. v. United States*, 1996 WL 132263 at *2 (Fed.Cir.1996) (finding the cost comparisons in *General Motors* "determinative" over 19 C.F.R. § 10.16), or has ignored the regulation altogether, *see Mast*, 668 F.2d at 506 (developing factors); *General Motors*, 976 F.2d at 718 (citing, but not applying regulation); *United States v. Oxford Industries, Inc.*, 668 F.2d 507 (C.C.P.A.1981) (applying *Mast* factors only). Indeed, defendant has recognized pursuant to the court's questioning that these decisions have cast considerable doubt on the regulation's validity. (Def.'s Suppl.Br. at 1-2.)

Finally, although defendant argues that Customs is entitled to deference pursuant to *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-44, 104 S.Ct. 2778, 2781-83, 81 L.Ed.2d 694 (1984), the recent decisions in *Crystal Clear Industries v. United States*, 44 F.3d 1001 (Fed.Cir.1995), and *Anval Nyby Powder AB v. United States*, 927 F.Supp. 463 (Ct. Int'l Trade 1996) may have put defendant's assertion into question. *See Crystal Clear*, 44 F.3d at 1003 (declining to apply *Chevron* deference to Customs in routine classification decisions); *see also Anval Nyby Powder AB*, 927 F.Supp. at 469 (finding "court's statutory obligation to find the correct result limits the court's ability to give special *Chevron* deference" to Customs' statutory constructions.) The court finds the Federal Circuit's test in *General Motors* as determinative.

CONCLUSION

The court in applying the *Mast* factors finds that the curing operation performed on Haggar's Model 245 Presstige men's pants, fabric style 2010, was a minor operation incidental to the assembly process under item 807.00, TSUS and

subheading 9802.00.80, HTSUS. Customs is ordered to allow a duty allowance for the components in issue.

JUDGMENT ORDER

This action having been submitted for decision, after trial and upon due deliberation, in conformity with the decision rendered, it is hereby

ORDERED that Customs grant a duty allowance under TSUS item 807.00 and HTSUS subheading 9802.00.80, for Haggar's Model 245 men's pants, fabric style 2010; and it is further

ORDERED that the action is dismissed.

APPENDIX C

UNITED STATES COURT OF APPEALS
FEDERAL CIRCUIT

No. 97-1002

HAGGAR APPAREL, CO.,
Plaintiff-Appellee,

v.

THE UNITED STATES,
Defendant-Appellant.

Oct. 22, 1997

Before RICH, NEWMAN, AND CLEVENGER, Circuit Judges.

RICH, Circuit Judge

This appeal in a so-called "American-goods-returned" case is from the decision by the United States Court of International Trade of 25 July 1996 in case number 93-06-00343 ordering the United States to grant a duty allowance for the goods in question. We affirm.

BACKGROUND

The merchandise at issue in this case consists of men's and women's permanent-press, wrinkle-free trousers that are assembled in Mexico from resin-impregnated fabric components made in the U.S. Plaintiff-appellee, Haggar Apparel Co. ("Haggar"), sells a line of such garments under the mark PRESSTIGE. There are three types of fabric used to make the PRESSTIGE garments: pre-cured fabrics in which the impregnating resin is cured before assembly into garments; synthetic fabrics which require pressing, but not

curing; and post-cured fabrics that require curing after assembly into garments. While only those garments made with the third type of fabric—the post-cured fabric—are at issue in this case, all of the Haggar PRESSTIGE products are assembled, tagged, and packaged in Mexico for distribution in the U.S. Indeed, except for the brief detour required to cure the post-cured fabric, all of the PRESSTIGE products are processed in the same plants and undergo the same assembly, tagging, and other processing steps.

OPINION

The issue in this case is whether the oven-baking process used to cure Haggar's post-cure fabric is an operation that is "incidental to assembly" under the tariff laws. The issue arises because the tariff provisions provide a partial duty allowance for certain U.S.-made components that are assembled outside the U.S. for return to the U.S. so long as the components are not advanced in value or improved in condition "except [by the actual assembly itself or] by operations [which are] incidental to the assembly process." Item 807.00, Tariff Schedules of the United States (1988) (for pre-1989 entries) and subheading 9802.00.80, Harmonized Tariff Schedule of the United States (1989).

The Court of International Trade, in a thorough opinion by Chief Judge DiCarlo, correctly applied the test set forth in the decision of this court's predecessor court in *United States v. Mast Indus., Inc.*, 69 C.C.P.A. 47, 668 F.2d 501 (C.C.P.A.1981), to determine whether ovenbaking is an operation that is incidental to assembly. In so doing, the court began its analysis by properly rejecting as overly restrictive the United States' argument that the term "assembly" means the joinder of two components. Instead, the court properly concluded that certain minor operations are not merely incidental to assembly, but are so integral to the process as to merge with it. The court then diligently applied

the factors applied by this court's predecessor in *Mast*, to analyze the curing operation at issue in this case. After balancing the relevant *Mast* factors, the court correctly concluded that the curing operation is "incidental to the assembly process" within the meaning of the statute.

The court next properly rejected the United States' argument that although "incidental to assembly," the curing process may nonetheless fall outside of the statute's tariff shelter if the process caused a prohibited advancement in value. The court looked to the express language of the statute and correctly concluded that the statute does not prohibit advancement in value where the operation in question is incidental to the assembly process.

Finally, the court properly rejected the United States' argument that Customs' regulations interpreting and applying this statute are entitled to deference under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-44, 104 S.Ct. 2778, 2781-83, 81 L.Ed.2d 694 (1984). As we have recently held in several cases, the United States' argument is without merit. *See Rollerblade, Inc. v. United States*, 112 F.3d 481, 483 (Fed.Cir.1997) (no *Chevron* deference applies to classification decisions); *Universal Elecs. Inc. v. United States*, 112 F.3d 488, 491-93 (Fed.Cir.1997) ("neither this court nor the Court of International Trade defers to Custom's interpretation of a tariff heading on the basis of special deference pursuant to [*Chevron*]"). Acknowledging the procedural importance of presumptions, the Court of International Trade is nonetheless charged with the duty to "reach the correct decision." *Rollerblade*, 112 F.3d at 484 (quoting 28 U.S.C. § 2643(b)). On appeal, we review the findings of that court—not those of Customs—for clear error; while we decide questions of law *de novo*. *Universal Elecs.*, 112 F.3d at 491.

CONCLUSION

The decision of the Court of International Trade was correct for the reasons stated in its opinion. Therefore, we affirm.

AFFIRMED.

APPENDIX D

[Filed Oct. 19, 2000]

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

97-1002

HAGGAR APPAREL CO.,
Plaintiff-Appellee,

v.

THE UNITED STATES
Defendant-Appellant.

ORDER

A combined petition for panel rehearing and rehearing en banc having been filed by the APPELLEE, and a response thereto having been invited by the court and filed by the APPELLANT, and the petition for rehearing having been referred to the panel that heard the appeal, and thereafter the petition for rehearing en banc and response having been referred to the circuit judges who are in regular active service,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing be, and the same hereby is, DENIED and it is further

ORDERED that the petition for rehearing en banc be, and the same hereby is, DENIED.

The mandate of the court will issue on October 26, 2000.

For the Court

/s/ Jan Horbaly (A.V.V.)
JAN HORBALY
Clerk

Dated: October 19, 2000